SETH DUCHARME REALLY, REALLY WANTS TO GRAYMAIL CHARLES MCGONIGAL'S PATH TO FREEDOM

I'm really not surprised that former Bill Barr flunky Seth DuCharme is trying to graymail the government in the SDNY case of his client, Charles McGonigal. That's a legal strategy whereby you demand so many highly classified documents for trial that the government is faced with the prospect of dismissing a criminal case rather than going to trial.

As a reminder, former Special Assistant in Charge of Counterintelligence in FBI's NY's Field Office McGonigal was charged in two indictments: A DC indictment charging him for hiding some meetings with and payments from an Albanian associate while still at the FBI, and a SDNY indictment charging him and Sergey Shestakov with money laundering and conspiring to violate the sanctions imposed on Oleg Deripaska after McGonigal left theFBI.

Almost six months and maybe one or two sealed docket items in, there's no public sign of a Classified Information Protection Act notice in the DC case (see this post for a background on CIPA).

Not so the SDNY case. That case has been headed for CIPA from the start.

But something funky is going on with the CIPA process, as if there's a CIPA filter team backstopping the prosecution team.

SDNY must have planned this from the start, and it is driving McGonigal's team nuts.

It started on February 8, when SDNY filed a CIPA letter, requesting a CIPA 2 conference.

Often, these letters review the entire CIPA process. The one Jay Bratt submitted in the Trump stolen documents case last week, for example, went through Section 1, Section 2, Section 3, Section 4, Section 5, Section 6 (broken down by sub-section), Section 7, Section 8, Section 9, and Section 10.

Not the SDNY one in the McGonigal case. It went through Section 2 — asking for a conference — and then stopped.

> The Government expects to provide the Court with further information about whether there will be any need for CIPA practice in this case, and to answer any questions the Court may have, at the CIPA Section 2 conference.

In response, on March 1, McGonigal's lawyers submitted their own CIPA letter, laying out Sections 1 through 8. Along the way, it described how important Section 4 is and informed Judge

> Section 4, which is in many ways the heart of CIPA, governs the methods of disclosure of classified information by the government to the defendant, pursuant to its constitutional and statutory obligations. See 18 U.S.C. § App. III § 4. Section 4 is implicated when the head of the department with control over the matter, and after personal consideration of the matter, invokes the states-secrets privilege to withhold classified information from the defendant in the interests of national security. Doe v. C.I.A., No. 05 CIV. 7939 LTSFM, 2007 WL 30099, at *1 (S.D.N.Y. Jan. 4, 2007); see also United States v. Aref, 533 F.3d 72, 80 (2d Cir. 2008). The states-secrets privilege however is not absolute: it "must—under some circumstances—give way . . . to a criminal defendant's right to present a meaningful defense." United States v.

> Abu-Jihaad, 630 F.3d 102, 141 (2d Cir. 2010). (internal quotations omitted).
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> Under Section 4, upon a "sufficient showing" by the government, the Court may authorize the government to "delete specified items of classified information from documents to be made available to the defendant . . . , to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove." 18 U.S.C. § App. III § 4. The government makes a sufficient showing that such alternatives are warranted through an ex parte submission to the Court. See id; see also United States v. Muhanad Mahmoud Al-Farekh, 956 F.3d 99, 109 (2d Cir. 2020). Of critical importance to the fairness of the process, the Court may review, ex parte and in camera, the classified information at issue to determine whether and in what form the information must be disclosed to the defendant, and whether the government has truly satisfied its discovery obligations. See, e.g., United States v. Aref, No. 04 CR 402, 2006 WL 1877142, at *1 (N.D.N.Y. July 6, 2006). To assist the Court in this analysis, the defense will provide the Court with its initial view of the scope of material that will be relevant and helpful in the preparation of the defense at the upcoming conference and will supplement that information as appropriate. [my emphasis]

This effectively flipped CIPA on its head, alerting Judge Jennifer Rearden they planned to tell the government what classified discovery should look like, not vice versa.

On March 3, Judge Rearden confirmed she would hold two separate CIPA conferences. The SDNY was

held on March 6. On March 7, the day *after* SDNY's CIPA conference and the day *before* McGonigal's, SDNY wrote to note how McGonigal had flipped on its head.

> Although much of McGonigal's general discourse on CIPA is unobjectionable, the Government believes several points require correction or supplementation.

The whole thing is worth reading: for the description that the US Attorney's Manual does not convey rights, for the observation that McGonigal had conflated the prosecution team and the Intelligence Community, for the challenge to McGonigal's claim that the IC *must* have information about "a recently retired FBI intelligence official being corrupted by a Russian oligarch" (there's even a long footnote distinguishing the Scooter Libby case, in both Circuit and victim, from this), and for McGonigal's claim to do in an ex parte Section 2 hearing what normally comes later, in Section 5.

But notably SDNY's response letter describes that while DOJ must comply with Brady, it doesn't have to tell a defendant *how* it is doing so.

> *Second*, although legal rules such as *Brady* and Federal Rule of Criminal Procedure 16 do obligate the Government to disclose particular information, they do not oblige the Government to explain to defendants *how* they have satisfied that obligation.

The next day, McGonigal had his CIPA hearing.

On May 8, SDNY filed a short letter informing Judge Rearden that they had declassified the material they had told her they would in their own CIPA 2 hearing and provided it to the defense.

> At the March 6, 2023 ex parte conference held pursuant to Section 2 of the

> Classified Information Procedures Act ("CIPA") in the above-referenced case, the Government described to the Court certain materials that the Government was seeking to declassify. The Government writes to confirm that those materials have been declassified and produced to the defendants. At this time, the Government does not anticipate making a filing pursuant to Section 4 of CIPA and believes it has met its discovery obligations with respect to classified information.

In saying they didn't anticipate making a filing pursuant to Section 4, they were undercutting the premise McGonigal's team had made back on March 1.

Given the letter McGonigal submitted last Friday, June 23, such an approach seems to be driving McGonigal nuts. It describes that it is puzzling and concerning and hard to imagine that there isn't more.

> With respect to the way forward as it pertains to classified discovery, as we noted at our last court appearance, the government has indicated that it "does not anticipate making a filing pursuant to Section 4 of CIPA and believes it has met its discovery obligations with respect to classified information." See ECF No. 44 at 1. In a subsequent series of conversations, the government informed us, in a general way, that it has satisfied its discovery obligations relating to classified information. The government's position is perplexing. While it is not surprising that the government does not wish to account for its each and every step in satisfying its constitutional obligations, it is puzzling and concerning that the government would, at this stage, determine that no CIPA Section 4 presentation to the Court is

> appropriate, when we are a year away from trial and the government's discovery obligations with respect to Rule 16, the Jencks Act, Brady and Giglio are ongoing. The indictment and the U.S. Attorney's press release include accusations that foreseeably implicate classified information within each of the four categories of discoverable information. With respect to the category of impeachment material alone, it is hard to imagine a world in which there are no classified materials that touch on the credibility of the government's trial witnesses (or alleged unindicted coconspirator hearsay declarants), and which would require treatment under Section 4 of CIPA.

It explains that both McGonigal and Seth DuCharme can be trusted with the government's classified information — after all, McGonigal was *only* indicted for cozying up to the Russian oligarch he had hunted for years!

Not mishandling classified information.

And Seth DuCharme was, until recently, trusted with Bill Barr's most sensitive secrets.

> Further, it is hard to understand why the government is so reluctant to be more transparent in explaining its discovery practices to the defense in this case. While many national security cases involve defendants with no prior clearances or experience with the U.S. Intelligence Community, and may involve only recently-cleared defense counsel who may be new to navigating the burdens and responsibilities of handling classified information, here, those concerns do not apply. Mr. McGonigal was one of the most senior and experienced national security investigators in the FBI with significant direct professional experience in the areas germane to his

> requests for assurances about the thoroughness of the government's discovery analysis. In addition, before moving to private practice, the undersigned counsel served as the Chief of the National Security Section, the Chief of the Criminal Division and the Acting United States Attorney in the U.S. Attorney's Office in the Eastern District of New York as well as the Senior Counselor to the Attorney General of the United States for National Security and Criminal matters, and has responsibly held TS/SCI clearances with respect to some of the United States government's most sensitive programs. As the Department of Justice has concluded in re-instating defense counsel's clearances for the purpose of this case, we are trustworthy. So, here, we have a defendant and defense counsel who are highly respectful and experienced with regard to the protocols for handling and compartmentalizing sensitive classified information, and simply request comfort that the government has indeed done everything it would normally do in a case such as this, with sufficient detail to assess the credibility of the government's position.
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> Notably, Mr. McGonigal has not been accused of mishandling classified information in the cases brought against him, and he maintains respect for the national security interests of the United States, as of course do we. In addition, we are *not* asking the government to disclose to the defense any sensitive sources and methods by which discoverable information was collected—only to provide greater transparency to us, and to the Court, as to how it views its procedural obligations, so that we may consider the fairness and reasonableness of the government's approach. Mr. McGonigal is

> *personally familiar* with this process from his time at the FBI, and it is reasonable for him to expect to be treated no worse than the other defendants who have come before him. To adequately represent Mr. McGonigal, it seems only fair that we be allowed to hold the United States government to the same standards that the defendant upheld as a national security and law enforcement professional, and to make a record of the government's position.

DuCharme then invoked the *Nejad* case where, under his former boss' tenure, a sanctions case blew up because DOJ failed to meet its discovery obligations.

Given DuCharme's helpful offer to meet in a secure hearing or to submit a more highly classified brief, he's clearly got something specific in mind.

> In sum, if the government could explain, in an appropriate setting, how it determined that it had obviated the need for a CIPA Section 4 proceeding, we likely can avoid speculative motion practice, and the parties and this Court may be assured that we can continue to litigate this case fairly and with the level of confidence to which we are entitled.
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> [snip]
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> To the extent the Court would like more detailed briefing on these issues prior to the conference, the CISO has provided to cleared defense counsel access to facilities that would allow us to draft a supplemental submission at a higher classification level.

To be sure: I'm not sure which side is right here, and CIPA always sucks for defendants.

But both sides are dancing around something awfully interesting, as if the circumstances that led to McGonigal's compromise are different — potentially even significantly worse — than anyone is letting on.

McGonigal's team repeatedly invoked State Secrets. And DuCharme was the Barr flunky who ran interference so that Rudy Giuliani (whose close associate implicated McGonigal) could seek out dirt from known Russian agents without getting arrested. So the background here could indeed be quite interesting.

Thus far, at least, SDNY is refusing to play that game.

Timeline

January 12: Indictment

February 8: DOJ requests a CIPA 2 hearing

March 1: Seth DuCharme sends his own CIPA letter

March 3: Judge Rearden orders a CIPA 2 hearing

March 7: SDNY writes to refute some of DuCharme's claims

May 8: SDNY writes to confirm it has declassified the materials described at March 6 CIPA hearing and does not believe it will need a CIPA 4 hearing

June 23: DuChare writes again saying it's not possible for SDNY to have fulfilled its obligations